LUCILLE MAKWASHA
And
FELIX MAKWASHA
versus
INNSCOR APPLIANCE MANUFACTURING (PVT) LTD T/A CAPRI
and
SHERIFF FOR ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 20 February, 2018 and 16 May, 2018

Urgent Chamber Application

B. Mudhara, for the applicants
G. Madzoka, for the 1st respondent
No appearance for the 2nd respondent

MANGOTA J: This application was referred to me on the basis of urgency. I heard the parties' submissions and dismissed it in the form of an *ex tempore* judgment.

The applicants wrote, through their legal practitioners, requesting for reasons. These are they:

The applicants are husband and wife. They co-own stand 810 Mandara Township of Lot 11 of Mandara of the Grange ("the property").

In about 2015 the husband's business encountered financial difficulties. It failed to service its debts. Five of his creditors obtained judgments against him. Among the five creditors was the first respondent whom he owes the sum of $65 277.80.

All the five creditors attached the property in an effort to each satisfy its claim against him. His wife owns an undivided half share in the property. She agreed with him to sell the same by private treaty. The idea was for them to realise more from such a sale than they would have realised through a forced sale.

In July 2017, the applicants' legal practitioners engaged the legal practitioners of their creditors who had attached their property. The engagement aimed at arriving at a distribution

formula in respect of 50% of the proceeds of the sale (the other 50% being the wife's share which is not effected by her husband's debts).

Annexure B is the letter which the applicants' legal practitioners addressed to the creditors who had attached their property. The same was addressed to the first respondent. It is dated 19 July, 2017.

As at the mentioned period of time, the applicants had found a purchaser who had offered them $197 000 for the property. Their legal practitioners submitted to all the creditors, the first respondent included, a distribution plan. Four of the five creditors accepted it. The first respondent initially refused to accept it but eventually allegedly accepted it.

After the first respondent had allegedly accepted the plan, another creditor Leon Business Solutions noted another caveat on the property. It is owed $527 046. That debt, according to the applicants, adversely affected the distribution plan. A second distribution plan was, therefore, drawn.

All the creditors, it is alleged, accepted the second distribution plan. Thereafter, the applicants' legal practitioners sent out to each creditor letters of undertaking. The same was delivered to the first respondent on 20 December, 2017.

All creditors, except the first respondent, uplifted the caveats which they had placed on the property. The first respondent did not. It allegedly advanced no reasons for its position.

The attitude of the first respondent gave birth to this application. The applicants moved the court to compel it to uplift the caveat and, if it did not do so within five days of the order, to authorise the second respondent to sign all documents which are necessary for the upliftment of the caveat.

The first respondent opposed the application. It denied that it ever accepted the distribution plans or consented to the upliftment of the caveat.

The second respondent did not oppose the application. My assumption was that he chose to abide by the decision of the court.

The applicants are the authors of their misfortunes. They sold the property which they knew was encumbered before they secured the consent of all the creditors who had encumbered the same. The agreement of sale, Annexure XYZ, which they concluded with Edmore Chakumhara and Mellania Chakumhara constitutes ample evidence of the stated fact. They signed that agreement on 12 July, 2017.

It was only after they had concluded the agreement of sale that they wrote the second applicant's creditors, the first respondent included, submitting to the latter their distribution

plan. Annexure B which the applicants attached to their application is relevant. It is dated 19 July 2017.

The annexure is a letter which the applicants' legal practitioners addressed to the first respondent's legal practitioners. Its tone is clear and straight forward. It indicates that a sale of the property has occurred, the purchase price is $197 000, the first respondent's debtor will receive $80 000 as his share of the proceeds of the sale after deductions, the same debtor owes other two creditors and he agrees that his aforesaid half share be paid towards the liquidation of his three debts on a pro-rata basis. It ends with a sentence which reads "Kindly advise if this proposal is acceptable to your client."

There is no evidence which shows that the first respondent accepted the distribution plan Annexure C, which the applicants attached to their letter of 19 July 2017. The applicants were being economic with the truth when they alleged that it did. They alleged, during the hearing of the application, that the first respondent's legal practitioners advised their legal practitioners verbally of its acceptance of the distribution plan. Those, on their part, denied having ever given them that advice.

Annexure ABC which the first respondent's legal practitioners produced during the hearing of the application refutes the applicants' allegations in a very material manner. The annexure is an email which the first respondent's legal practitioners addressed to their client (i.e. the first respondent) on 12 February 2018. Its contents read, in the relevant portion, as follows:

> "Let me have your instructions on <u>whether or not we should consent to the upliftment of the XN Caveat</u> we registered against the property." [emphasis added]

It is evident that, as late as February 2018, the first respondent had not accepted the applicants' distribution plans or consented to the upliftment of the caveat.

The applicants' narration of events was totally incoherent. They produced two distribution plans. These are Annexures C and D. They described themselves, in both Annexures, as the sellers of the property. E Chakumhura is referred to in both annexures as the purchaser.

A comparative analysis of both annexures shows some marked difference in figures. These are they:

		Annexure C	Annexure D
i)	Amount to be received	$197 000	$205 000
ii)	Wintertons Inscor	$36 087	$9148.25

The applicants gave no explanation as to the fact of whether or not the property which they sold to Chakumhura for $197 000 had its price revised upwards to $205 000. They did not tell why the first respondent whom they said was entitled to $36 087 in Annexure C had the same figure reduced to $9148.25 in Annexure D.

The first respondent raised the above described difference in figures, its proposed pro-rata share of the proceeds of the sale in particular, as the reason for its refusal to accept the applicants' distribution plans. Its concerns in the mentioned regard are understandable. It cannot be faulted for having taken the position which it took.

The incoherence of the applicants' narration of events does not end with the above analysed set of matters. The Capital Gains Tax Clearance Certificate which they attached to the application places the value of the property which they sold at $207 000. The stated sum is different from the one which they quoted in Annexure D. They stated, in the annexure, that the purchase price of the property was $205 000 and not $207 000.

Paragraph 18 of the applicants' founding affidavit constitutes another anomaly which they failed to explain. It reads:

> "18. On the 15th of February 2018 I was advised by the agent that the purchaser's bank Stanbic now plans to withdraw from the transaction because of the delays encountered due to 1st respondent's failure to uplift the caveat. They cannot wait indefinitely. I attach hereto the emails from Stanbic and the purchaser to my legal practitioners as Annexure L."

Annexure L appears at p 30 of the record. It refers to a property which is at number 11 Herbert Lane, Strathaven. It does not relate to the property which is the subject of this application. No explanation was given by the applicants for the stated mix-up. Nor was any evidence tendered on the relevance of the annexure to the application.

The applicants' letter of 19 July, 2017 requested the first respondent to respond advising them if their proposal was acceptable to it. The letter, it is evident, was not responded to. The applicants waited until 14 December 2017 when they, once again, addressed their second letter to the first respondent. They waited for four clear months from July to December, 2017. They gave no explanation at all for that period of waiting.

Attached to their letter of 14 December, 2017 was their letter of undertaking. They stated, for the first time, that the purchaser of the property was not Chakumhara but Chashe Foundation Trust. They stated, in the same, that the amount which was payable to the first respondent was not $36 087 but was $9 148-15.

The first respondent, it is evident, did not respond to the applicants' letter of 14 December, 2017. They did nothing about the matter for the whole of January, 2018. They gave no explanation at all for their inaction.

The applicants realised that they had not treated their case with the urgency which it deserved. They became alive to the fact that they did not act for four months running – i.e during the period August to November, 2017. They also realised that they should have acted in the course of the whole of January, 2018.

The applicants wasted a lot of their time writing letters to which the first respondent did not ever respond. They did not file their urgent chamber application for a period which is in excess of six months running. They advanced no reason at all for their unacceptable delay.

The letter which applicants addressed to the first respondent on 9 February, 2018 served no purpose other than to bring their delayed action into the realms of urgency. I stated in the *ex tempore* judgment, and I reiterate, that the applicants closed the stables when the horses had already bolted. Their application does not at all fall into what r 244 of the High Court Rules, 1971 contemplate. It is self-created urgency which the court cannot entertain. A *fortiori* when its story is told in dribs and drabs which, when pieced together, make a complete mockery of the country's justice delivery system.

It was for the mentioned reasons, if for no other, that I dismissed the application with costs.

Mundia & Mudhara, applicant's legal practitioners
Wintertons, 1st respondent's legal practitioners